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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1937.

No. [REDACTED]

25

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., and  
Its Affiliated Companies, etc., *Petitioners*,

against

NATIONAL LABOR RELATIONS BOARD, *et al.*

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. B-825; INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL UNION NO. B-839; IN-  
TERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. B-832; INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL UNION NO. B-826; IN-  
TERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. B-828; INTERNATIONAL BROTHERHOOD  
OF ELECTRICAL WORKERS, LOCAL UNION NO. B-829; AND  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. B-830, *Petitioners*,

against

NATIONAL LABOR RELATIONS BOARD, *et al.*

(Consolidated Cases.)

**PETITION OF ABOVE NAMED BROTHERHOOD  
AND LOCAL UNIONS FOR WRIT OF CERTIORARI  
TO THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE SECOND CIRCUIT, AND  
BRIEF IN SUPPORT THEREOF.**

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OCTOBER TERM, 1937.

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No. ....

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. B-825, AND SAID OTHER LOCAL UNIONS,  
AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,  
*Petitioners,*

*against*

NATIONAL LABOR RELATIONS BOARD AND UNITED ELECTRICAL  
AND RADIO WORKERS OF AMERICA, AFFILIATED WITH THE  
COMMITTEE FOR INDUSTRIAL ORGANIZATION.

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**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE SECOND CIRCUIT.**

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*To the Honorable, the Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The Petitioners, International Brotherhood of Electrical Workers, and said named Local Unions, respectfully pray that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Second Circuit rendered in the above cause on March 14, 1938 (R. 1737), and the judgment of that Court entered on March 21, 1938 (R. 1737), refusing

to set aside an Order of the National Labor Relations Board of November 10, 1937, and directing that a request of said National Labor Relations Board for the enforcement of said Order be granted.

A.

**STATEMENT OF THE MATTER INVOLVED.**

Petitioners herein are the International Brotherhood of Electrical Workers and seven of its Local Unions, all affiliated with the American Federation of Labor. The membership of these Locals numbers something over 30,000 out of 38,000 eligible employees of the Consolidated Edison Company of New York, Inc., and its six affiliated Companies, herein referred to as Consolidated Edison (R. 1505).

Contracts were executed in May and June, 1937, between the Brotherhood and its Locals, all of whose members were employees of Consolidated Edison, on the one hand, and the Consolidated Edison and its affiliated companies, on the other. The contracts were each authorized by a majority of the employees of each of the Edison companies and of the respective Local Unions which entered into them. Reference to the contracts (R. 1581) will reveal that they are of the utmost importance with relation to the vital concerns and interests of the workers composing the several Locals in their employment. They contain provisions, among others, for a system of arbitration of disputes relating to employment and stipulate against strikes and lockouts, thus giving practical assurance against any cessation of service by the Companies with which they are made. These contracts were abrogated by the Board's said Order of November 10, 1937.

Charges against the Consolidated Edison Company and its affiliates (R. 4) were filed with the Board on May 5, 1937, by the United Electrical and Radio Workers of America, herein called the United, an affiliate of the Committee for Industrial Organization. A Complaint (R. 7) embodying these charges was issued by the Board May 12, 1937. *Consolidated Edison and its said affiliates were the only parties who were made respondents or defendants in the Complaint and to the proceeding before the Trial Examiner and Board. Neither the Brotherhood nor the Locals were made parties, nor were they brought into the proceedings in any manner whatsoever.* The charge of May 5, and the Complaint in its original form, as issued May 12, did not mention or prefer any charge against the Brotherhood or its Locals, nor did the Complaint or any of the several amendments to it make any mention of the contracts or attack their validity or raise any question as to representation or election. Moreover, at no time during the hearings before the Trial Examiner was any statement made, by or on behalf of the Board or any of the parties, that the validity of the contracts or any question of representation or election was in issue. Statements were made by the Board's counsel that there was no question of representation involved (R. 279). The Complaint was amended June 10 and 14 (R. 13, 14 and 15), after the hearings before the Trial Examiner were begun and substantially advanced. No amendment until that of June 14 affected the Brotherhood or its said Locals under or within the Act.

No legal notice, either actual or constructive, was at any time given to the Brotherhood or its said Locals of either the charge of the United of May 5, the Complaint of May 12 or any of the amendments thereto, or of any

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action which contemplated the abrogation and annulment of their contracts and the consequent destruction of their property, contractual and personal rights. The methods of giving notice and the service of papers are provided for in the National Labor Relations Act, herein called the Act, in Section 11 (4), as follows:

*"Complaints, orders, and other process and papers of the Board, its member, agent or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same".*

Article V, Section 1 of the Rules and Regulations of the Board (Series 1, as amended) is the same as the above sub-section, and Section 2 of said article provides:

*"Service of papers by a party on other parties shall be made by registered mail or in any manner provided for the service of papers in a civil action by the law of the State in which the hearing is pending. When service is made by registered mail, the return post office receipt shall be proof of service. When service is made in any manner provided by such law, proof of service shall be made in accordance with such law."*

There is in the Record (18-19) a Western Union Telegraph Messenger Errand Service ticket stating that on May 12, 1937, "3 packages" were sent to "United Elec Radio Workers 1133 Bway; Intl Brotherhood Elec Workers 103E25; Consolidated Edison Co 3 Irving Place". It also has on it: "Lu 3 IBEW D Kaplan". Just what

was receipted for by "D Kaplan" does not appear other than the statement in the ticket that "3 packages" were sent. Who "D Kaplan" is, or what the position, status or authority of such person was, has never been made apparent. The letters and figure "Lu 3" presumably mean Local Union No. 3. *That is not one of the Local Unions of employees, Petitioners herein, in the service of any of the Consolidated Edison Companies.* Even the true address and place of business of Local Union No. 3 is not "103E25" but 130 E. 25th Street. None of the Petitioners herein has an office, business, residence or address at either of those places.

Moreover, the affidavit of Sadie Jacobs, a Board stenographer, as to proof of service of the original Complaint and notice of hearing (R. 18) does not mention any service whatever on the International Brotherhood of Electrical Workers or any of its said Locals, nor does it refer to any messenger errand ticket or the sending of any package by such agency. Her affidavit refers exclusively to alleged service by registered mail, the numbers of which are specified in the affidavit. No return receipts are included, and it is clear that the receipt numbers for registered mail mentioned in the affidavit relate only to the receipts for mail to the Consolidated Edison affiliates named therein.

With reference to the amended notice of hearing of the original Complaint (R. 34), sent out on May 25, the affidavit of Alan J. MacAdams (R. 35-36) states that the amended notice was served upon the Consolidated Edison and its affiliates, at their respective addresses, upon Robert H. Coulson, Esq., 40 Wall Street, N. Y. C., and "International Brotherhood of Electrical Workers, 130 East 25 Street, N. Y. C.", by sending to them "at the ad-

dressses indicated, by postpaid registered mail, return receipt requested," the amended notice of hearing of May 25; that he received therefor from the U. S. Post Office, N. Y. receipts for registered articles, dated May 25, 1937, numbered 303160 to 303168, respectively, said receipts being attached as part of the affidavit. The copies of the post office receipts are omitted. *No return receipts are stated in the affidavit to have been received; and no such receipts are included in the Record.* In view of this omission in the Record and in order to ascertain whether or not there were any such return receipts, the Board, after the certified transcript of the Record had been filed by it and had been subjected to particular inspection upon the subject, was requested to search its files to ascertain whether it could find therein a return receipt for registered mail sent on or about May 25, 1937, to "International Brotherhood of Electrical Workers, 130 East 25 Street, N. Y. C.", at which place, as aforesaid, neither the Brotherhood nor its said Locals had any residence, office, place of business or habitation. *No such return receipt was discoverable.*

The Complaint, as finally amended, charged that Consolidated Edison had engaged in and were engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of the National Labor Relations Act. [July 5, 1935, 49 Stat. 449; 29 U. S. C. Section 158 (1), (2) and (3), and Section 152 (6) and (7).] *There was no allegation of violation of Section 9 (c) of the Act relating to representation or election.*

Pursuant to amended notices to the Respondent Companies, none of which, as aforesaid, were served upon or brought to the attention of the Brotherhood or its said

Locals, hearings were held before the Trial Examiner on June 3, 10, 11, 14, 15, 16, 17, 23 and 24 and July 6, 1937. The Brotherhood and its said Locals, not being parties, and not having been served with any legal process, summons, citation or notice, took no part whatever in the proceedings before the Trial Examiner or the Board.

On June 14, 1937, an important and very radical amendment of the Complaint was made. This consisted of changing the figure "21" to "22" in paragraph "23" and in paragraph "24" of the Complaint (R. 15).

The intent and effect of said Amendments of June 14, 1937, were to make the Complaint charge that the matters mentioned in paragraph "22" as to the Brotherhood "affected commerce" as defined in the Act, by bringing the allegations of paragraph 22 within paragraphs 23 and 24 of the original Complaint. By those Amendments the matters complained of in paragraph 22 were brought *for the first time within the purview of the Act and within the jurisdiction of the Board*. The Complaint as thus basically and radically amended was never served upon the Brotherhood or any of said Local Unions, nor was any notice of the Complaint, as thus fundamentally modified, mailed or otherwise sent or delivered to the Brotherhood or any of the Local Unions.

On September 29, 1937, long after the conclusion of the hearings before the Trial Examiner in New York on July 6, 1937, and without any Intermediate Report upon his part, the Board summarily ordered the proceedings to be "transferred and continued" before it at Washington, D. C., and, on November 10, 1937, announced its decision and order (R. 65, *et seq.*). The conclusions of law of the Board embraced findings

that Consolidated Edison and its affiliates had violated Section 8 (1) and (3), and that these violations affected commerce within the meaning of Section 2 (6) and (7) of the Act. *The Board specifically found that there had been no violation within the meaning of Section 8 (2) of the Act.* The Order of the Board directed Consolidated Edison and its affiliates, *inter alia*, to Cease and Desist from "Giving effect to their contracts with International Brotherhood of Electrical Workers", and "Recognizing the International Brotherhood of Electrical Workers as the exclusive representative of their employees".

Pursuant to Section 10 (f) of the Act, Petitioners, the Brotherhood and its said Locals, upon learning of the passage of the Board's Order, as well as Consolidated Edison and its affiliates, on November 18, 1937, petitioned the United States Circuit Court of Appeals for the Second Circuit, as persons aggrieved by the final Order of the Board, to review and set aside the Order of November 10, as unconstitutional and void. Answers of the Board and requests for the enforcement of its Order were filed to these respective petitions (R. 1691 and 1711) to which replies were filed by the Petitioners (R. 1726 and 1734).

By stipulation (R. 1736) of counsel for the Board, Consolidated Edison and its subsidiaries, and the Brotherhood and its said Locals, it was agreed that the two said Petitions under Section 10 (f) be consolidated and heard as one case in the Circuit Court of Appeals, and that the record certified by the Board be the only record required to be certified in the cases as consolidated. This stipulation was approved by the Court below, *per* his Honor, Judge Manton (R. 1737) and the cause proceeded accord-

ingly. The Circuit Court of Appeals denied the two Petitions and ordered the Board's Order to be enforced and executed.

On April 2, 1938, Consolidated Edison and its affiliates petitioned this Court for a writ of certiorari to review the decision and Order sought to be reviewed by this Petition.

## B.

### QUESTIONS PRESENTED.

(1) Were Petitioners necessary or indispensable parties to proceedings abrogating and annulling their contracts?

(2) Were Petitioners entitled to notice of proceedings which abrogated and annulled their contracts?

(3) Were the alleged notice and service of the original Complaint of May 12, and the alleged service of the amended notice of hearing of May 25, 1937, in compliance with constitutional requirements of due process of law, and with Section 11 (4) of the National Labor Relations Act and Article V of the Rules of the National Labor Relations Board?

(4) Were Petitioners denied due process of law by Section 1 (f) and (g) of the Order of November 10, 1937, of the National Labor Relations Board, requiring Consolidated Edison and its affiliates to cease and desist from giving effect to their contracts with Petitioners and from recognizing Petitioners as the exclusive representatives of the employees of Consolidated Edison and its affiliates, when no question as to the validity of the contracts or as to representation for collective bargaining was raised in the charge of May 5 or the Complaint or any amended Complaint, or at the hearings, and the Board

dismissed so much of the Complaint as involved any charges that Consolidated Edison and its affiliates had dominated or interfered with the formation or administration of, or had contributed financial or other support to, Petitioners, contrary to Section 8 (2) of the Act?

(5) Does the National Labor Relations Act authorize the Board to exercise jurisdiction over these Petitioners in their labor relations with Consolidated Edison and its affiliates, which are local operating public utilities doing business wholly within New York, are concededly not engaged in commerce as defined in the Act, and are subject to plenary regulation by New York under its Public Service Law and its State Labor Relations Act?

(6) Did the Order of November 10, 1937, of the National Labor Relations Board, abrogating and annulling the contracts of Petitioners, exceed the authority and power of the Board and comply with the constitutional requirements of due process of law, the National Labor Relations Act, and with the Rules and Regulations of the Board (a) when hearsay and other illegal testimony was admitted before the Trial Examiner and made the basis of findings of fact by the Board, (b) when the Trial Examiner and the Board refused to hear evidence sought to be introduced by Consolidated Edison at the hearings, (c) when the Trial Examiner made no report or findings as contemplated by Article II, Section 32 of the Rules of the Board, and no opportunity was afforded to file exceptions to his report as contemplated by Section 34, (d) when none of the members of the Board saw or heard any of the witnesses who testified before the Trial Examiner, and (e) the Board afforded no opportunity to parties in interest or affected by its final Order to be heard before the passage of the same.

## C.

**REASONS RELIED ON FOR THE ALLOWANCE  
OF THE WRIT.**

1. The first and probably basic question in this case is that of the jurisdiction of the National Labor Relations Board over these Petitioners, the International Brotherhood of Electrical Workers and its Local Unions, composed of employees in the service of the Consolidated Edison Company of New York, Inc. and its affiliated Companies, named as Respondents in the proceeding instituted by the National Labor Relations Board. It is contended by the Petitioners herein, as well as by said Respondent Companies, that they are not engaged in interstate or foreign commerce within the meaning of the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution of the United States, or within the term "Commerce" as defined by the National Labor Relations Act, and that the relations of their membership with said Companies as their employers do not affect commerce within or under the Federal Constitution or said Federal Act.

The Circuit Court of Appeals, in its Opinion, rendered March 14, 1938, stated, with reference to said question of jurisdiction, that "*None of the Labor Board Cases decided by the Supreme Court has presented a situation like that at bar*", and, after reviewing recent decisions of the Supreme Court upon the subject, further stated: "*We recognize that these cases are not decisive of the case at bar, but we think the principles they have announced point to the conclusion we have reached.*" It is respectfully submitted that said basic question of jurisdiction of the National Labor Relations Board over these Petitioners and their employers, the Consolidated

Edison Company of New York, Inc. and its affiliated Companies, has not, as expressly recognized and avowed by the Circuit Court of Appeals, been determined by any decision thus far rendered by the Supreme Court respecting the National Labor Relations Act; that the importance of this basic question of jurisdiction, as presented herein, is so manifestly great and far-reaching that exposition herein of that importance is needless; that there is essentially involved a conflict between the Federal jurisdiction and that of the State of New York; and that, accordingly, said question ought to be determined, upon certiorari, by final adjudication upon the part of this honorable Court.

The matters involved in the said question of jurisdiction, as affected by the said Board's Order of November 10, 1937, have a very material and far-extending effect upon these Petitioners, their employers, and approximately ten million people in the City and State of New York, who are the consumers of the products of these Petitioners in the service of their said employers. It would, therefore, seem to be eminently appropriate that the jurisdiction of the National Labor Relations Board over these Petitioners and their employers, and said contracts between them, be adjudicated by the Supreme Court as a finality.

2. The effect of the Opinion and Order of the Circuit Court of Appeals is to maintain the constitutionality of the abrogation of the contracts entered into between these Petitioners and the Consolidated Edison Company of New York, Inc. and its affiliates. The Opinion and Order in this respect present constitutional questions of great and far-reaching importance, which, it is respectfully sub-

mitted, have not been specifically determined by this honorable Court and, therefore, should be finally adjudicated by it as the National Tribunal of last resort.

These Petitioners, as appears herein, respectfully maintain that the Board abrogated their contracts without due process of law, and that they were denied due process in various and highly important respects herein already indicated, which, for brevity, are not repeated here. With reference to them, however, it is respectfully submitted that the fundamental constitutional rights referred to by these Petitioners with respect to the Board's abrogation of their contracts, as said rights are involved herein, should be adjudicated by this honorable Court. The Opinion of the Circuit Court of Appeals indicates substantial doubt upon its part whether the Board's Order invalidating said contracts was an appropriate Order. That it was an appropriate Order, the said Court declared '*is not so clear*', and in illustration thereof referred to various matters wherein the *Greyhound Case* differs from the case at bar. It is respectfully submitted that there is no decision of the Supreme Court of the United States which decides or deals with the question of the appropriateness of the Board's said Order abrogating said contracts, or with the constitutionality of its Order abrogating said contracts of these Petitioners with their employers, in the several and various constitutional respects raised and presented by the proceedings herein, and that said constitutional questions involving personal, property and contractual rights of these Petitioners, and involved in the administration of the National Labor Relations Act, should be considered and passed upon by this honorable Court.

3. The proceedings before the Board, sanctioned by the decision of the Circuit Court of Appeals, culminating in its Order destroying the contracts of Petitioners, constituted such a departure from the accepted and usual course of administrative procedure as to call for the exercise of this Court's power of supervision. The Order of the Board exceeded the authority and power of the Board, and denied these Petitioners, as well as Consolidated Edison and its affiliates, due process of law guaranteed by the Fifth Amendment in that the Board refused to hear the question of its jurisdiction over the proceedings, and, moreover, never granted a lawful hearing to these Petitioners or to Consolidated Edison and its affiliates, all of whom had vital rights and interests in the matters finally disposed of by the Order. After allowing the matter to sleep from July 6 to September 29, 1937, when the Board ordered it to be "transferred and continued" before itself, and thence until its Order of November 10, 1937, no hearing was ever accorded to any interested person upon any element of the case, either of fact or of law. This Court has held that mere recitals of procedure cannot be regarded as conclusive in determining whether in conducting an administrative proceeding statutory requisites and due process of law have been complied with. The Court below referred to the Board's refusal to hear certain witnesses present in the hearing room as "*unreasonable and arbitrary*", and plainly indicated that the successive steps leading to the Board's final Order did not meet with its approval, and intimated that a review by this Court was desirable to clarify the question of the propriety of the Board's procedure. The Court said, with regard to Petitioners' contentions in this respect:

"The first (complaint of Petitioners') relates to the Board's direction that the proceeding be transferred to it pursuant to Rule 37.. The result was that the Trial Examiner made no intermediate report, as contemplated by Rule 32, and the Petitioners had no opportunity to file exceptions to his report as contemplated by Rule 34. Nor were they accorded oral argument before the Board, although it must be presumed that their brief (Consolidated Edison) submitted to the Trial Examiner came to the Board's attention. *This procedure is not one likely to inspire confidence in the impartiality of the proceedings.* It results in the findings of fact being made by persons who did not see the witnesses—a matter which may have far reaching consequences in view of the very limited power conferred upon the Courts to review the Board's findings of facts."

With particular regard to the kind of testimony admitted over objection, some of which amounted to third degree hearsay, upon which decisive findings of fact were made by the Board, it is respectfully submitted that this cause presents a situation calling for review and supervision by this Honorable Court.

WHEREFORE, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in case numbered on its Calendar No. 178 and on its Docket No. 15,686, and entitled as above shown, and that said judgment of the Circuit Court of Appeals may be reversed or modified by this Honorable Court, and that your Petitioners may have such other and fur-

ther relief in the premises as to this Court may seem just and proper.

And your Petitioners will ever pray, etc.

Dated, April 11, 1938.

ISAAC LOBE STRAUS,  
CLAUDE A. HOPE,  
and  
DELAFIELD, MARSH, PORTER & HOPE,  
*Counsel for Petitioners.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1937.

No.\_\_\_\_\_

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;  
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,  
LOCAL UNION NO. B-825, AND SAID OTHER LOCAL UNIONS,  
AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR,  
*Petitioners,*

*against*

NATIONAL LABOR RELATIONS BOARD AND UNITED ELECTRICAL  
AND RADIO WORKERS OF AMERICA, AFFILIATED WITH THE  
COMMITTEE FOR INDUSTRIAL ORGANIZATION.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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### I.

#### OPINIONS BELOW.

The Opinion of the United States Circuit Court of Appeals has not been officially reported. It was filed March 14, 1938, and is in the Record beginning at page 1737. The decision, findings of fact, and conclusions of law of the National Labor Relations Board begin in the Record at page 65. The Order of the Board is at page 127.

## II.

**JURISDICTION.**

Petitioners seek a review by certiorari pursuant to Judicial Code, Section 240 (a), as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 [U. S. C. Tit. 28, Sec. 347 (a)], and Section 10 (e) of the National Labor Relations Act of July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 [U. S. C. Tit. 29, Sec. 160 (e)]. The date of the decision sought to be reviewed is March 14, 1938 (R. 1737), and the date of the judgment is March 21, 1938, (R. 1748). It was entered by the United States Circuit Court of Appeals for the Second Circuit in pursuance of its rulings refusing to set aside a final Order of the National Labor Relations Board of November 10, 1937, and directing that a request of said Board for the enforcement of said Order be granted. The matter came before the United States Circuit Court of Appeals for the Second Circuit pursuant to Section 10 (f) of the National Labor Relations Act, by written petitions of the Petitioners herein (R. 1554) and of Consolidated Edison Company of New York, Inc., and its affiliated companies, Brooklyn Edison Company, Inc., et al. (R. 1473), parties aggrieved by the said Order of the Board, seeking a review and vacation of the said Order of the National Labor Relations Board of November 10, 1937. By stipulation of counsel for the National Labor Relations Board, Consolidated Edison Company of New York, Inc. et al., and International Brotherhood of Electrical Workers, et al., respectively (R. 1736), confirmed by the Court, the two Petitions for review under Section 10 (f) were consolidated and heard as one case on the calendar of the Circuit Court of Appeals, and the record certified to said Court

by the National Labor Relations Board was accepted as and declared to be the only record required to be certified, printed and filed in the case.

### III.

#### **STATEMENT OF THE CASE.**

A full statement of the case has been given under heading A in the petition for writ of certiorari, and for brevity the statement is not repeated here.

### IV.

#### **SPECIFICATIONS OF ERRORS.**

(1) The Circuit Court of Appeals erred in finding and holding that Petitioners were not necessary or indispensable parties to the proceeding before the Trial Examiner and the National Labor Relations Board, which resulted in the passage by said Board of its Order abrogating and annulling Petitioners' contracts and destroying their contractual, personal and property rights.

(2) The Court below erred in not finding and holding that Petitioners were entitled to notice of the proceedings before the Trial Examiner and the National Labor Relations Board, which resulted in the passage by said Board of the Order abrogating and annulling Petitioners' contracts and destroying their contractual, personal and property rights.

(3) The Court below erred in not finding and holding that the alleged notice and service of the original Complaint of May 12, and the attempted service of the amended notice of hearing of May 25, 1937, did not comply with constitutional requirements of due process of law, and did not comply with Section 11 (4) of the Na-

tional Labor Relations Act and Article V of the Rules of the National Labor Relations Board.

(4) The Court below erred in finding and holding that Petitioners were accorded due process of law in the passage of Section 1 (f) and (g) of the Order of November 10, 1937, of the National Labor Relations Board, requiring Consolidated Edison and its affiliates to cease and desist from giving effect to their contracts with Petitioners and from recognizing Petitioners as the exclusive representatives of the employees of Consolidated Edison and its affiliates, when no question as to the validity of the contracts or as to representation for collective bargaining was raised in the charge of May 5, the original Complaint, or the Complaint as amended, or at the hearings, and the Board dismissed so much of the Complaint as involved any charges that Consolidated Edison and its affiliates had dominated or interfered with the formation or administration of, or had contributed financial or other support to, Petitioners, contrary to Section 8 (2) of the Act.

(5) The Court below erred in finding and holding that the National Labor Relations Act authorizes the National Labor Relations Board to exercise jurisdiction over the Petitioners in their labor relations with Consolidated Edison and its affiliates and over the matters complained of to the Board and ruled upon by it, and that the Act, as construed, applied and administered by the Board in this case, complies with the Fifth and Tenth Amendments to the Constitution of the United States.

(6) The Court below erred in finding and holding that the Order of November 10, 1937, of the National Labor Relations Board, abrogating and annulling the contracts

of Petitioners, was within the authority and power of the Board, and complied with the constitutional requirements of due process of law as protected against violation by the Fifth Amendment to the Constitution of the United States, and with the Act and Rules and Regulations of the Board.

(7) The Court below erred in upholding the Order of November 10, 1937, of the National Labor Relations Board and in sanctioning the admission before the Trial Examiner of hearsay and other illegal testimony upon which findings of fact were made by the Board, the rulings of the Trial Examiner and the Board refusing to hear important and pertinent evidence offered by Consolidated Edison, the procedure of the Trial Examiner who made no report or findings, and afforded no opportunity to file exceptions to his report as contemplated by Article II, Sections 32 and 34 of the Rules of the Board, the passage of the Order by members of the Board who neither saw nor heard any of the witnesses who testified before the Trial Examiner, the action of the Board in affording no opportunity to either Petitioners or other parties in interest to be heard before the passage of the said Order of November 10, 1937.

V.  
**ARGUMENT.**

I.

Petitioners were necessary and indispensable parties to the proceedings before the Trial Examiner and the Board, and were entitled to legal notice thereof, in view of the invalidation of their Contracts by the final Order of the Board.

The case relied on by the Court below in denying Petitioners' contention that it was a necessary party, namely,

*National Board v. Pennsylvania Greyhound Lines*, 302 U. S. —, presented an entirely different factual and legal situation from the instant case. There the Employees' Association was not, as here, a *bona fide*, independent and recognized labor organization, but was found to be a company dominated union in violation of Section 8 (2) (violation of this Section was dismissed here), and the control of the management so permeated every aspect of the Association's operations that, as argued by the Government there (See Board's petition for writ of certiorari in *Pennsylvania Greyhound* case, No. 413, October Term, 1937, p. 17), "*the Association and the management cannot be regarded as separate entities.* \* \* \* Notice to respondents (management) was thus in any event notice to the Association." And further:

"Nor is the argument that 'the union enjoined has not been notified or heard, entitled to any weight. \* \* \* If it were true that Employees Association was 'enjoined' by the Board's order it will be readily conceded that the Association would have been an indispensable party and should have been joined. But the Board's order is not addressed to the Employees Association, it imposes no obligation upon the Association, and the Association is not bound by it in any way. The order is directed solely against respondents and restrains their conduct only.'"

And the Board as a further reason for its position pointed out that the Association there, after the Board's decision was made public, *did not petition for review under 10 (f)*, as was immediately done by these Petitioners here.

It is thus seen that there is no reasonable parallel between the *Greyhound* case and the instant one. There the question was merely as to the disestablishment of a company dominated union; here solemn agreements pro-

viding for a system of arbitration of disputes relating to employment and stipulating against strikes and lockouts were struck down. There the Government's position was that the management and the Association were one; here the facts and the *finding of the Board* are the reverse of that proposition. There was no application by the Association for review under 10 (f) there; while here Petitioners applied for review immediately upon publication of the Board's Order. There the Government conceded that if the Association was *enjoined* by the order, or if the order had imposed obligations on or bound the Association, it would have been an indispensable party. Here, Petitioners are, in plain effect, affirmatively *enjoined* from exercising contractual rights, and of this there can be no dispute, although the Order runs only to Consolidated Edison and its affiliates, because the only possible result of the Order is to dissolve Petitioners' contractual obligations which would otherwise be binding and in full force and effect.

*General Inv. Co. v. Lake Shore, etc., R. Co.*, 260 U. S. 261, 285-286, cited by this Court in the *Greyhound* case as authority for the ruling that the Association was not an indispensable party, may well be cited as authority for Petitioners' position in that respect in the case at bar. That case involved a suit by a shareholder to prevent two corporations from carrying out an agreement for a consolidation, *where the agreement had not yet been ratified or executed*; but this Court held that as to certain allegations of the bill which affected joint rights, a situation analogous to the one at bar, both parties were indispensable parties, saying (285):

"As to so much of the bill as sought to enjoin the New York Central Company from voting its shares

in the Lake Shore Company and to enjoin the latter from permitting it to vote them, we think it is obvious that the New York Central Company was an indispensable party, and that with it neither appearing nor reached by any effective process no other course was open than to dismiss that part of the bill. *Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235, 246; *Taylor & Co. v. Southern Pacific Co.*, 122 Fed. 147, 152, 154."

All persons having a substantial interest of property or liberty in the subject matter or object of a proceeding are indispensable parties to it. The Order of November 10, 1937, destroyed property, personal and contract rights of inestimable value to, and inflicted irremediable injury upon, the Petitioners herein. Nevertheless, they were neither named nor brought in as parties to the proceeding, and were not before the Board, actually or constructively, when it ordered the destruction of their rights. Therefore, it is respectfully submitted, the omission of these Petitioners as indispensable parties to this proceeding renders the whole proceeding, and particularly the Order of the Board so far as it affected these Petitioners in the grave aspects of which they complain, unconstitutional and void.

- Mallow v. Hinde*, 12 Wheat. 193, 6 L. ed. 599.
- Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825.
- Russell v. Clark*, 7 Cranch 69.)
- Shields v. Barrow*, 17 How. 130, 15 L. ed. 158.
- Gregory v. Stetson*, 133 U. S. 579, 33 L. ed. 792.
- Swan Land, etc. Co. v. Frank*, 148 U. S. 603, 37 L. ed. 577.
- Nashville, etc. R. Co. v. Orr*, 18 Wall. 471, 21 L. ed. 810.
- Ribon v. Chicago, etc. R. Co.*, 16 Wall. 446, 21 L. ed. 367.

*Minnesota v. Northern Securities Co.*, 184 U.S.  
S. 199, 235, 46 L. ed. 499.

*Gareat v. DeRubio*, 209 U. S. 283, 52 L. ed. 794.

*Lee v. Lehigh Valley Co.*, 267 U. S. 542, 69 L. ed. 782.

*Commonwealth Trust Co. v. Smith*, 266 U. S. 152, 69 L. ed. 219.

*Niles-Belmont-Pond Co. v. Iron Moulders Union*, 254 U. S. 77, 65 L. ed. 145.

In *Employers Reinsurance Corp. v. Bryant*, 299 U. S. 374, 381, 81 L. ed. 289, 293, this Court said:

"It is conceded, and rightly so, that the district court was without personal jurisdiction of the defendant, and that in the absence of such jurisdiction the court was without power to proceed to an adjudication. \* \* \* In this instance the dispute or controversy was not properly within the jurisdiction of the district court unless \* \* \* (3) the defendant was before the court by reason of a general appearance or a valid service of process. Each of these elements of jurisdiction was essential, and if any was wanting there was an absence of proper jurisdiction. The defendant was not before the court, and therefore it was without jurisdiction to proceed with the suit. Counsel for the petitioner assume that the presence of the defendant was not an element of the court's jurisdiction as a federal court; but the assumption is a mistaken one. By repeated decisions in this Court it has been adjudged that the presence of the defendant in a suit in personam, such as the one now under discussion, is an essential element of the jurisdiction of a district (formerly circuit) court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication."

In 21 Corpus Juris, Equity, Sec. 277, page 282, it is said:

"All the parties to a contract are ordinarily indispensable parties to a bill in equity for its enforce-

ment, or for its rescission and cancellation, or reformation, or to enjoin its performance or its breach, particularly where they have joint or common rights or liabilities. The rescission of an agreement requires the presence of all claiming property through such agreement."

It is further said in 21 Corpus Juris, Equity, Sec. 276, page 273, in reference to indispensable parties:

"This class includes all persons who have an interest in the controversy of such a nature that a final decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. Accordingly, persons whose interests will necessarily be affected by any decree that can be rendered are necessary and indispensable parties, and the Court will not proceed to a decree without them."

Continuing, the said section of Corpus Juris, at page 277, further says:

"The principle underlying the rule as to indispensable parties is fundamental and underlies the administration of justice in all courts of equity. It is that no proceedings shall take place with respect to the rights of any one, except in his presence. The rule as to indispensable parties is neither technical nor one of convenience, but is of imperative obligation."

In 1 Foster, Fed. Pr. (6th ed.), Section 120, page 724, it is said:

*"Parties indispensable to a decree.* No suit, however, can proceed unless the court have before it as parties all persons who will be directly affected by the decree sought, or whose obedience is necessary to its enforcement, when it does not appear that they consent thereto. A person is affected by a decree

when its rights against, or liability to, any of the parties to the suit is thereby determined. • • •

"Every party to a contract, whether of sale or for another purpose, except one who has released or assigned his interest • • • is a necessary party to a suit to enforce it; or to set it aside."

See also section 110, pp. 677-678; section 120, pp. 726-727.

## II.

Neither the attempted service upon Petitioners of the notice of May 12, nor that of the amended notice of May 25, 1937, was a valid service of process, or compliance with Section 11 (4) of the Act or Article V of the Board's Rules, or with the constitutional requirements of due process of law.

The provision of the Act, Section 11 (4), (*ante*, p. 4) referring to process and service, whether by mail, telegraph or personally, specifies that it must be made at "the principal office or place of business of the person required to be served," and Article V, Section 1 of the Board's Rules is to the same effect. Neither of the two attempts at service here was directed to the principal office or place of business of either the Brotherhood or any of its said Local Unions, but each time there was an attempt to serve Local Union No. 3 of the International Brotherhood of Electrical Workers, 103 or 130 East 25 Street, N. Y. C., none of the members of which are employees of Consolidated Edison or its affiliates, and which is not one of the Local Unions whose contracts were destroyed. As to proof of service, the Act, Section 11 (4) provides that the "verified return of the individual so serving the same setting forth the manner of such

service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same." The service of May 12, 1937, was apparently attempted to be made by telegraph errand service but, as set forth under heading A of the petition for writ of certiorari, the receipt for the same (R. 18-19) is woefully deficient in showing anything that can be regarded as a valid service of process on the Brotherhood or its said Locals. On the contrary, it shows, if anything, that packages were left with an individual who may or may not have been connected with a local union which was not one of the Local Unions of employees of Consolidated Edison or any of its affiliates, nor a union whose contract was nullified by the Board's Order. Moreover, the affidavit (R. 17-18) wholly omits any reference to the telegraph errand service ticket. This receipt, in the light of the authorities hereinafter cited, wholly fails to show a valid or effective service of the Complaint and notice of hearing of May 12 upon these Petitioners.

Similarly, the affidavit of the clerk—stenographer (R. 35-36) fails to show a valid or effective service of the amended notice of hearing of May 25 upon the Brotherhood or the Local Unions of employees in the Consolidated Edison system, but shows that the notice was sent to "International Brotherhood of Electrical Workers, 130 East 25 Street, N. Y. C.", which is not, as aforesaid, one of the Local Unions whose contracts were destroyed or whose members are employed in the Consolidated Edison System. The return receipts are omitted from the record, no "return receipts" are stated in the affidavit to have been received, and no such receipts are included in

the transcript. Moreover, search by the Board among its files failed to disclose any return receipt from "International Brotherhood of Electrical Workers" which has not and never had any residence, office, or place of business at "130 East 25 Street, N. Y. C." No effort was ever made to serve the Brotherhood, whose office in Washington, D. C., is well known, or any of the Local Unions whose contracts were destroyed. That there was no proper or valid service is affirmatively manifest.

The general principle here directly applicable is well settled and familiar that where a special administrative board or tribunal is clothed with jurisdiction for particular purposes, such jurisdiction in cases in which its exercise is attempted must be affirmatively shown by the proceedings themselves to have been acquired. Such special jurisdiction is never presumed, but must positively appear to support judgments or decisions purporting to be within it. And, as is well known, this rule applies especially to administrative boards and tribunals of the Federal Government.

The proposition last stated is found in innumerable judicial decisions, of which perhaps none states it more distinctly than Mr. Justice Field for this Court in *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959.

In *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 35 S. Ct. 625, 59 L. ed. 1027, this Court condemned a statute as embodying provisions repugnant to due process with respect to *notice* and *actual notice*. The principles there discussed and applied in the elaborate Opinion of this Court are cogently applicable to the facts at bar. In the course of its exposition of the many aspects of the subject, this Court said:

"Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires. In *Stuart v. Palmer*, 74 N. Y. 183, 188, \* \* \* the Court said: 'It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard.' The soundness of this doctrine has repeatedly been recognized by this Court."

See also:

*U. S. ex rel Turner v. Fisher*, 222 U. S. 204, 56 L. ed. 165.

In *Galpin v. Page*, 18 Wall. 350, 21 L. ed. 959, above quoted, Mr. Justice Field emphatically said:

"It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In *1 Foster Fed. Pr.* (6th ed.) Sec. 167 A, p. 972, it is said:

"A statement that service has been made upon the defendant's agent does not authorize the presumption that such agent had the right to receive service of process."

*Boulbee v. International Paper Co.*, 229 Fed. 951.

The "process" required to be made or served upon individuals, whose *property or personal rights are to be disposed of* by the adjudication of a cause, must bring or summon such individuals into the cause and require their actual or constructive presence before the Court.

*Employers, etc. Corp. v. Bryant*, 299 U. S. 374; 81 L. Ed. 289.

That service on Local Union No. 3 is, in law, *not a service* on any of the petitioning Local Unions herein, or the International Brotherhood of Electrical Workers, all of whom are profoundly interested in the matters which the Board dealt with as within the Complaint and determinable thereupon, has been often judicially declared.

*United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 60 L. Ed. 975.

In *Dean v. International Longshoremen's Ass'n, et al.*, (Dist. Ct. La.), 17 Fed. Supp. 748, directly herein in point, the Court said:

"As was pointed out by the Supreme Court in *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 345, 42 S. Ct. 570, 66 L. Ed. 975, these *international labor unions* are entities, separate and distinct from the members who compose them and from the *local organizations*. It is true that case did not involve a question of citation or jurisdiction, but, if it be true, as must be conceded, that they have rights as juridical personages distinct from the members or locals who compose them, then it necessarily follows that they cannot be brought into Court by service merely upon a member, but must be cited through someone having authority either expressed or necessarily implied from his relation to the association or the duties which he discharges. Mayo has not been shown to possess any such authority . . . .

See *Christian v. Inter. Ass'n of Machinists*, 7 F. (2d) 481; *Singleton v. Order of Ry. Conductors*, 9 F. Supp. 417."

In *Christian v. International Ass'n of Machinists, et al.* (D. C. Ky.), 7 Fed. (2) 481, also directly in point, the Court said:

"So; also, it must be held that the chairman or any other officer of a local union is not a representative of the International Union for service of process. There is no more reason for holding that he is than that a mere member of such union is. As to some of the defendants the individual on whom process was served sustained no official relation to a local union. It would have made no difference if he did. \* \* \* It should be noted that in the Coronado Case the Supreme Court, through Chief Justice Taft, said: 'For these reasons, we conclude that the International Union, the District No. 21, and the 27 local unions were properly made parties defendant here, and properly served by process *on* their principal officers.'

"\* \* \* It is not to be blinked at that these unions, International and local, artificial units and entities, and suable as such, cannot be brought before the Court, save by service of process on a direct representative, whose relation thereto is such that it is reasonable to infer that the service of such process on him will bring home to the union which he represents. They are entities, distinct and separate from their membership and subordinates, as much so as a corporation is an entity distinct from its stockholders or subordinate organization."

In 63 *Corpus Juris*, Trade Unions, Sec. 94, p. 705, it is said:

"On the other hand, service of process on an officer of a local union and a member of a general union

is insufficient to give the court jurisdiction of the latter."

See also:

*Coronado Coal Co. v. United Mine Workers*,  
268 U. S. 295, 45 S. Ct. 551, 69 L. ed. 963.

*United Brotherhood of C. & J. v. McMurtrey*,  
179 Okla. 575, 66 Pac. (2) 1051.

*Singleton, et al., v. Order of Ry. Conductors  
of America*, (D. C. Ill.), 9 Fed. Supp. 417.

*United Mine Workers v. Pennsylvania Min-  
ing Co.*, (C. C. A. 8), 300 Fed. 965.

*Pennsylvania Mining Co. v. United Mine  
Workers*, (C. C. A. 8), 28 F. (2d) 851.

### III.

Petitioners were denied due process of law by Section 1 (f) and (g) of the Board's Order, abrogating their contracts and directing non-recognition of the Brotherhood as exclusive representatives of employees, when neither the validity of the contracts nor representation was in issue, or embraced in the charge, the Complaint or amended Complaint, or raised at the hearings or at any other time, and the Board dismissed so much of the Complaint as involved company domination or support contrary to Section 8 (2) of the Act.

Even if notice of the original Complaint and hearing upon it had been served upon Petitioners prior to the amendments of June 14, 1937, the Complaint did not contain or make any charge of unfair labor practices or of any offense affecting commerce and within the Act against Petitioners, and, therefore, did not give them any information or notice of any such charge. The Complaint, moreover, made no reference whatever to the contracts or to representation for collective bargaining dealt with by the Board's Order.

The precise point here presented was adjudicated in the recent decision of this Court in *U. S. v. Seminole Nation*, 299 U. S. 417, 421-422, 81 L. ed. 316, 318-319. The Opinion of the Court by Mr. Justice Butler, collating the Supreme Court decisions on the subject, discusses it as follows:

"The jurisdiction of the lower court was limited to claims sued on before the expiration of the period within which the United States consented to be sued. *It did not extend to any cause of action which was not alleged in plaintiff's original petition.* The judgment may not be sustained as to any item that is not included in a cause of action set up in the original petition or that was by the findings of the lower court or otherwise put upon a ground not there alleged. *Harrison v. Nixon*, 9 Pet. 483, 503, 9 L. ed. 201, 208; *Boone v. Chiles*, 10 Pet. 177, 209, 9 L. ed. 388, 399; *Garland v. Davis*, 4 How. 131, 148, 11 L. ed. 907, 915. It may not be upheld as to any item that is not supported by definite findings of fact extending to all essential issues and which, unaided by statements in the court's conclusions of law or its opinion, are clearly sufficient to entitle plaintiff to recover. *United States v. Esnault-Pelterie*, 299 U. S. 201, 205, ante, 123, 57 S. Cit. 159." See also:

*Windsor v. McVeigh*, 93 U. S. 274, 23 L. ed. 914.

*Arredondo v. Arredondo*, 23 U. S. 376, 56 L. ed. 476.

*New Orleans v. Citizens Bank*, 167 U. S. 371.  
*Washington, A. & G. R. Co. v. Washington*, 10 Wall. 299.

Due process of law guaranteed by the Constitution requires definite information and notice to the person whose rights are to be affected by any proceeding in a

court or before an administrative board or tribunal, of the claim or complaint against him, as well as of the order or judgment sought. The notice must be such that the person to be affected by the proceeding may be advised from it of the charge or claim against him, and of the relief sought from the court or other tribunal wherein the charge, claim and application for the relief are preferred. Judicial decrees or judgments, or administrative adjudications and orders, affecting the liberties or property of citizens, in the absence of such notice to the party to be affected, violate the fundamental principles of our law and cannot be sustained. It is an axiom not only of constitutional law, but of pleading and practice that one may not bring a suit or proceeding for one cause of action and recover a judgment for another, much less recover an order or judgment taking away property, or of conviction for offense, without suit and notice of the claim or charge upon which the order or judgment is founded. The decisions to that effect are virtually without number.

These principles are vigorously applied, and the authorities sustaining them collated in *In re Rosser*, 101 Fed. 562, (C. C. A. 8th, per Circuit Judge Sanborn) a leading and frequently followed case on this subject, to which this Honorable Court is particularly referred upon the point here under consideration.

After reviewing the authorities and the proceedings leading up to the final order, Judge Sanborn said (568):

"Such a proceeding lacks every element of due process of law. It contains no notice to the party affected of the claim against him, or of the proposed action upon it, no opportunity to contest the questions of fact which it presents by the cross-examina-

tion of the claimant's witnesses or the presentation of his own, and no chance to be heard upon the questions of law which it involves. *It considers without notice, condemns without hearing, and renders judgment without trial.* The order of the referee was unlawful and void."

After the amendments of June 14 in the Complaint, there was no service whatsoever of said Complaint so amended, nor of any notice of hearing thereon made or attempted by the Board, Regional Director, or Trial Examiner upon any of the Petitioners herein. As the amendments of June 14, 1937, of the Complaint made the *first and only* complaint or charge *affecting commerce within the Act* against the Brotherhood, the undeniable and indisputable facts above stated present a case to this Honorable Court of an Order of the Board entered upon a Complaint and striking down valuable property and personal rights of the Brotherhood and the Local Unions without any service or notice to them or any of them of any charge or complaint within the very same Act of Congress under which the Order of the Board purported to have been passed, and from which alone the Board derived whatever jurisdiction or authority it possessed. The statement of such a proceeding demonstrates its illegality. If these Petitioners had none of the other grounds of objection herein preferred against the Order, this ground, it is respectfully submitted, suffices to establish the illegality and nullity of the Order.

#### IV.

The Act does not authorize the Board to exercise jurisdiction over the labor relations of Consolidated Edison and its subsidiaries, and over the subject matter of the Complaint or amended Complaint, including Petitioner's

contracts which the Order destroyed, when said Companies are not engaged in commerce as defined in the Act and do business wholly within New York, by which they are subject to regulation. The Act, as construed, applied and administered by the Board in this case, conflicts with the Fifth and Tenth Amendments to the Constitution of the United States.

The basic question of jurisdiction here presented is so luminously discussed in the Petition for certiorari and supporting Brief of the Consolidated Edison Company of New York, Inc., and its affiliated Companies, filed in this Court in these consolidated cases on April 2, 1938, that, in order to avoid repetition and prolixity herein, we respectfully beg to refer this honorable Court to that Petition and Brief at pp. 2-6; 12-14 and 18-22. The earlier decisions of this Court on the subject in question are reviewed in the recent cases of *Carter v. Carter Coal Co.*, 298 U. S. 238-341; *Schechter Poultry Corp. v. United State*, 295 U. S. 495-550; the *Jones & Laughlin* case, 301 U. S. 1; the *Freuhau*f case, 301 U. S. 53; *Friedman-Marks* case, 301 U. S. 72; and the recent *Santa-Cruz Fruit Packing Co.* case, decided by this Court March 28, 1938. It is respectfully submitted that the four decisions last named do not destroy the distinctions between interstate and intrastate commerce settled and preserved by this Court from the foundation of the Federal Government. And it is particularly urged that not any of those decisions decide the question of jurisdiction herein presented.

The decision in the *Santa Cruz Fruit Packing Co.* case, decided by this Court March 28, 1938, two weeks after the decision and a week after the judgment rendered herein by the Circuit Court of Appeals, does not dispose

of the question of jurisdiction as herein presented, inasmuch as in that case about 37 per cent of the total output of the employer was shipped in interstate or foreign commerce, wherein "there was a constant stream of loading and shipping of products". Moreover an *actual strike* had there been in progress, with a cessation of the flow of commerce. Furthermore there was no question at all raised or presented as to the adequacy of State regulation, there being no State regulation of the business of the employer or of its labor relations with its employees. The Consolidated Edison System, and the employees in its service, conducting admittedly an intrastate business, sell only to persons within the State of New York, a few of whom themselves apply the utility produced and sold to them in New York in interstate commerce. A comparatively small amount, not comparable in percentage of the whole to the 37 per cent in the *Santa Cruz Company* case, finds its way not from the Consolidated Edison System, but only indirectly and remotely through a few of its customers in New York City and State, into interstate commerce. The wholly intrastate public utilities of the Consolidated Edison and its affiliates are subject to plenary State regulation, comprehending every feature of production, distribution, and service, and particularly including its labor relations with the Petitioners, under the State Labor Relations Act. There has never been any finding or suggestion that the State Labor Relations Act and Board have been or are in any way inadequate to prevent conditions which might prejudice either intrastate or interstate commerce. It is respectfully submitted that the facts and conditions disclosed by the Record in this case contravene the existence of "such a close and substantial relation to interstate commerce that their control is essential or appropriate

to protect that commerce from burdens and obstructions". As declared by this Court in its said most recent decisions, the federal power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them \*\*\* would effectually obliterate the distinctions between what is national and what is local and create a completely centralized government. The question is necessarily one of degree" (*Jones & Laughlin case*, at p. 37).

The principle involved is that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear (*Florida v. United States*, 282 U. S. 194, 211); and that the federal should be relinquished to the state power, where its exercise would involve control of or interference with the internal affairs of a domestic corporation of the state (*Pennsylvania v. Williams*, 294 U. S. 176, 185, *Hopkins Savings Assn. v. Cleary*, 296 U. S. 315).

## V.

The Order of the Board abrogating and annulling Petitioners contracts, exceeded the authority and power of the Board, and the proceedings leading to the Order did not comply with the Act or the Board's Rules, and constituted a denial of due process of law in contravention of the Fifth Amendment.

An administrative board of the Federal Government has only the powers conferred upon it by law. When created by Act of Congress or lawful executive order, its powers must be found in the act or order. When such powers are not expressly conferred, they may exist only

by clear and manifest intendment from express grants. Power over and affecting the *life, liberty, property and security of the citizen* may not be taken by inference, but only when the statute under which it is claimed demonstrates a plain intent to grant it.

In *Interstate Comm. Comm. v. Cincinnati etc. R. Co.*, 167 U. S. 479, 494-495, 505, 509, 42 L. ed. 243, Mr. Justice Brewer, speaking for this Court with reference to the power to fix rates, said:

"That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood and have been frequently used, and if Congress had intended to grant such a power to the Interstate Commerce Commission it cannot be doubted that it would have used language open to no misconstruction, but clear and direct."

2 Lewis' Sutherland on Statutory Construction, sec. 627, pp. 1136-1137; sec. 630, p. 1140; sec. 569, p. 1053; sec. 572, pp. 1056-1057; sec. 573, pp. 1058-1060; sec. 562, p. 1046; sec. 564, p. 1048; sec. 565, pp. 1048-1049; sec. 546, p. 1019; sec. 493, pp. 921-922; sec. 499, p. 931; secs. 520-525, pp. 963-974; sec. 720, pp. 1310-1311.

*Potter's Dwarris on Statutes*, 224.  
59 C. J., pp. 1127-1128.

There can be no intent of a statute not expressed in its words, and a legislative intention not expressed in some appropriate manner has no legal existence.

*Dewey v. U. S.*, 178 U. S. 510, 44 L. ed. 1170.  
*Lee Bros. v. Cran*, 63 Conn. 433.  
*Union Life Ins. Co. v. Champlin*, 116 Fed. 858  
(C. C. A.).

The "*policy of the government*" in reference to any particular subject of legislation is too "*uncertain*" and "*a ground much too unstable upon which to rest the judgment of the Court in the interpretation of statutes.*"

*Dewey v. U. S.*, 178 U. S. 521, 44 L. ed. 1174.

*Haddon v. Collector*, 5 Wallace, 111, 18 L. ed. 519.

"The construction must be liberal in favor of private right, and construction which implies an intention to deny valuable rights should be avoided; statutes are presumed to be passed in full recognition of the constitutional rights of the citizen."

*Frazier v. Leas*, 127 Md. 575.

The Act specifically enumerates the powers and describes the duties of the Board. It is surely to be presumed that every power of considerable importance and extent is *expressed* in the Act. And more particularly, it is respectfully submitted, a power to *abrogate and annul* property and personal rights and contracts must inevitably have been mentioned in the Act, if a grant of such power had been intended. The only power, having even a remote relation to that subject, granted by the Act, is the power given to the Board to investigate and ascertain the facts in the matter of representation of groups or units of employees for collective bargaining with their employers. That power is given and defined by Section 9 of the Act. It is a power of investigation. And, in order to render such an investigation effective, to order an election; by the group or unit of employees in question, of a representative or representatives for the designated purpose. Such election is to be determined by a majority of the employees voting. It may be held under the direction of the Board, whose officers or agents ascertain

the result and report them to the Board, which in turn certifies the result to the employer and employees concerned.

Under the Fifth Amendment, Congress cannot constitutionally deprive citizens of their property without due process of law by impairing the obligation of a contract.

*Hepburn v. Griswold*, 8 Wallace, 623-624.

*Carter v. Carter Coal Co.*, 298 U. S. 310-311, headnotes 24, 25, 80 L. ed. 1188-1189.

*Schechter Poultry Corp. v. U. S.*, 295 U. S. at p. 537, 79 L. ed. 1584:

*Eubank v. Richmond*, 226 U. S. 137, 57 L. ed. 156.

*Washington ex rel. Seattle Trust Co. v. Roberge*, 278 U. S. 116, 121-122, 73 L. ed. 210, 213-214.

*Hitchman Coal, etc. Co. v. Mitchell*, 245 U. S. 251-252.

*Lamb v. Chaney & Son*, 227 N. Y. 418.

In *Hepburn v. Griswold, supra*, it was laid down by Mr. Chief Justice Chase that the spirit of the prohibition against impairing the obligation of contracts pervades the entire body of legislation by the Federal Government and that an act of Congress whose direct prohibition impairs the obligation of contracts is inconsistent with the spirit of the Constitution. The Chief Justice found support for this view in the Fifth Amendment to the Federal Constitution, declaring that private property shall not be taken for public use without compensation, and particularly that the provision of that Amendment that "no person shall be deprived of life, liberty or property, without due process of law" must be construed "as a direct prohibition of legislation" impairing the obligations of contracts. And the Chief

Justice added: "It is not doubted that all the provisions of this Amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution."

See also Sutherland, Notes on United States Constitution, pages 641-643; 646-649.

12 C. J., Constitutional Law, sec. 956, pp. 1190-1192; sec. 958, pp. 1192-1194; sec. 961, pp. 1195-1196.

*2 Cooley Const. Lims.* (8th Ed.), p. 824.

*Meyer v. Nebraska*, 262 U. S. 390, 67 L. ed. 1042.

*Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937.

In *Willoughby on the U. S. Constitution* (2nd ed.), sect. 1196-1800, *et seq.*, it is said:

"No specific inhibition is laid upon the Federal Government by the Constitution with reference to the impairment of the obligation of contracts. The Government is, however, forbidden by the Fifth Amendment to deprive persons of property without due process of law and without just compensation. In so far, then, as contract rights may be treated as property, they are protected from direct impairment by federal action. This was definitely declared in the first legal tender decision of *Hepburn v. Griswold*, 8 Wall. 603.

"In the Sinking Fund cases it was declared: 'The United States cannot, any more than a State, interfere with private rights except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law.'

## VI.

The testimony of the Board's witnesses violated the basic principles of evidence essential to due process of law.

The rulings of the Trial Examiner and the very many objections to testimony, *en masse*, were affirmed in one indiscriminate fiat of the Board (R. 71) and ratified by the Court below without other reason than that hearsay is admissible in Board proceedings. Much of such illegal testimony was made the basis in great part of the Board's decision and Order, which were rendered without that lawful evidence required by just judicature as indispensable to judicial dealings with substantive rights.

The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and to have judicial findings based upon it.

*B. & O. R. Co. v. United States*, 298 U. S. 368-369, 80 L. ed. 1224.

*Ohio Water Co. v. Ben Avon*, 253 U. S. 287, 64 L. ed. 908, and the other decisions cited in note 29 appended to the above passage, 80 L. ed. 1224.

*Morgan v. United States*, 298 U. S. 468, 80 L. ed. 1288.

*Brown v. Mississippi*, 297 U. S. 286, 287, 80 L. ed. 687, 688.

*Hebert v. Louisiana*, 272 U. S. 312, 316, 71 L. Ed. 272.

As illustrations of typical statements of witnesses admitted in violation of the substantial rules of evidence guaranteed by due process of law for the protection of substantial rights, see Record, pages: 214, 215; 221;

248, 249; 256, 257; 261, 262; 275; 279 to 285; 418, 419; 447; 448, 449; 453 to 455; 458, 459; 526; 554; 555; 732, 733; 764, 765; 788; 868; 883; 884; 888; 889; 960; 1023; 1045; 1098; 1100; and 1161.

When the Board directed that the case be transferred to it pursuant to Article II, Section 37 of the Rules, the result was that the Trial Examiner made no intermediate report as contemplated by Section 32, and there was no opportunity afforded to file exceptions to the report as contemplated by Section 34. No opportunity was presented either to file briefs or argue orally before the Board. With regard to this kind of procedure, the Court below felt impelled to observe:

"This procedure is not one likely to inspire confidence in the impartiality of the proceedings. It results in findings of fact being made by persons who did not see the witnesses—a matter which may have far-reaching consequences in view of the very limited power conferred upon the courts to review the Board's findings of fact."

In *Morgan v. U. S.*, 298 U. S. 468, L. ed. 1288, involving an order of the Secretary of Agriculture under an Act of Congress, this Court, referring to the duties and powers of the Secretary under the Statute, said:

"There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. . . ."

"A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings has a quality resembling that of a judicial proceeding. Hence, it is frequently described as a proceeding of quasi-judicial character. The requirement of

a 'full hearing' has obvious reference to the tradition of judicial proceedings in which *evidence is received and weighed by the trier of the facts.* \*\*\* *The 'hearing' is the hearing of evidence and argument.* If the one who determines the facts which underlie the order has *not considered evidence or argument*, it is manifest that the hearing has not been given."

In *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 33 S. Ct. 185, 57 L. ed. 431, in construing a federal Statute relating to hearings before an administrative body in connection with rate-fixing, this Court said (p. 91):

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficially exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen, it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' \*\*\*"

Consolidated Edison and its affiliates were not given a hearing upon the amended Complaint against them after the close of the testimony before the Trial Examiner on July 6, 1937. Although they filed a brief, on July 15, with the Trial Examiner, the case rested and slept until the Board by its Order of September 29, 1937, required it to be "*transferred and continued*" before itself. Counsel for Consolidated Edison Companies were informed of that Order. They never heard anything more from the Board until informed that it had disposed of the case by its Final Order of November 10, 1937. The Trial Examiner neither gave them a lawful *hearing* upon the evidence, nor did he formulate, as the Act provides, an Intermediate Report upon the testimony, and transmit such a Report to the Board. From and after July 6, he remained inactive and silent. The Board did likewise from July 6, to September 29, 1937, when its silence and inaction were momentarily interrupted only by its Order that the case be "*transferred and continued*" before it, following which its silence and inaction were resumed and continued until it suddenly launched its bolt of November 10, 1937. It gave no notice of any hearing; it invited to no hearings; it neither asked for, nor authorized, any appearance, argument or advices from the Counsel for Consolidated Edison. It had no Intermediate Report, nor had the Counsel for the Companies any—because none had been made. It had a voluminous record of testimony and exhibits embracing thousands of typewritten pages. The proceeding dealt with a system of seven corporations supplying a public utility to a community of some ten million people and with a veritable army of employees exceeding 38,000 in number—all centered in and serving the Em-

pire State of the Union and its great business and commercial Metropolis. Moreover, the Board felt itself authorized to treat and act upon, as within the Complaint before it, important contracts wherein were involved the labor services and vital welfare of over 30,000 employees, the large and important business of the several Companies and the comforts, conveniences and essential needs of millions of people, and also a most important and delicate constitutional question of conflicting authority and jurisdiction between a State and the Federal Union. In spite of all that, the Board never gave the Consolidated Edison Companies a *hearing* from the time its Trial Examiner closed the taking of testimony before himself until it closed the case by final judgment against the Consolidated Edison Companies.

With respect to the Brotherhood and the Local Unions of Employees of the Companies, neither notice nor hearing was given them or any of them, by the Board, its Director, or Examiner, at any stage of the proceeding from beginning to end.

In *Morgan v. U. S. et al., supra*, this Court said:

"But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise, the statutory conditions could be set at naught by mere assertion. If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirements of due process as to notice and hearing. For the statute

itself demands a full hearing and the order is void if such a hearing was denied."

See also:

*St. Joseph Stock Yards v. United States*, 298 U. S. 38, 73.

*Interstate Commerce Comm. v. L. & N. R. Co.*, 227 U. S. 88, 91, 57 L. ed. 431.

*Chicago, etc. R. Co. v. Minnesota*, 134 U. S. 457.

*Windsor v. McVeigh*, 93 U. S. 274.

*Riverside Mills v. Menefee*, 237 U. S. 189.

*Roberts v. Anderson et al.* (C. C. A. 10), 66 Fed. (2) 874.

*In re Rosser*, 101 Fed. 562.

### CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, under the authority hereinabove cited, and that to such end a writ of certiorari should be granted and this Honorable Court should review the decision of the United States Circuit Court of Appeals for the Second Circuit and finally reverse it.

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